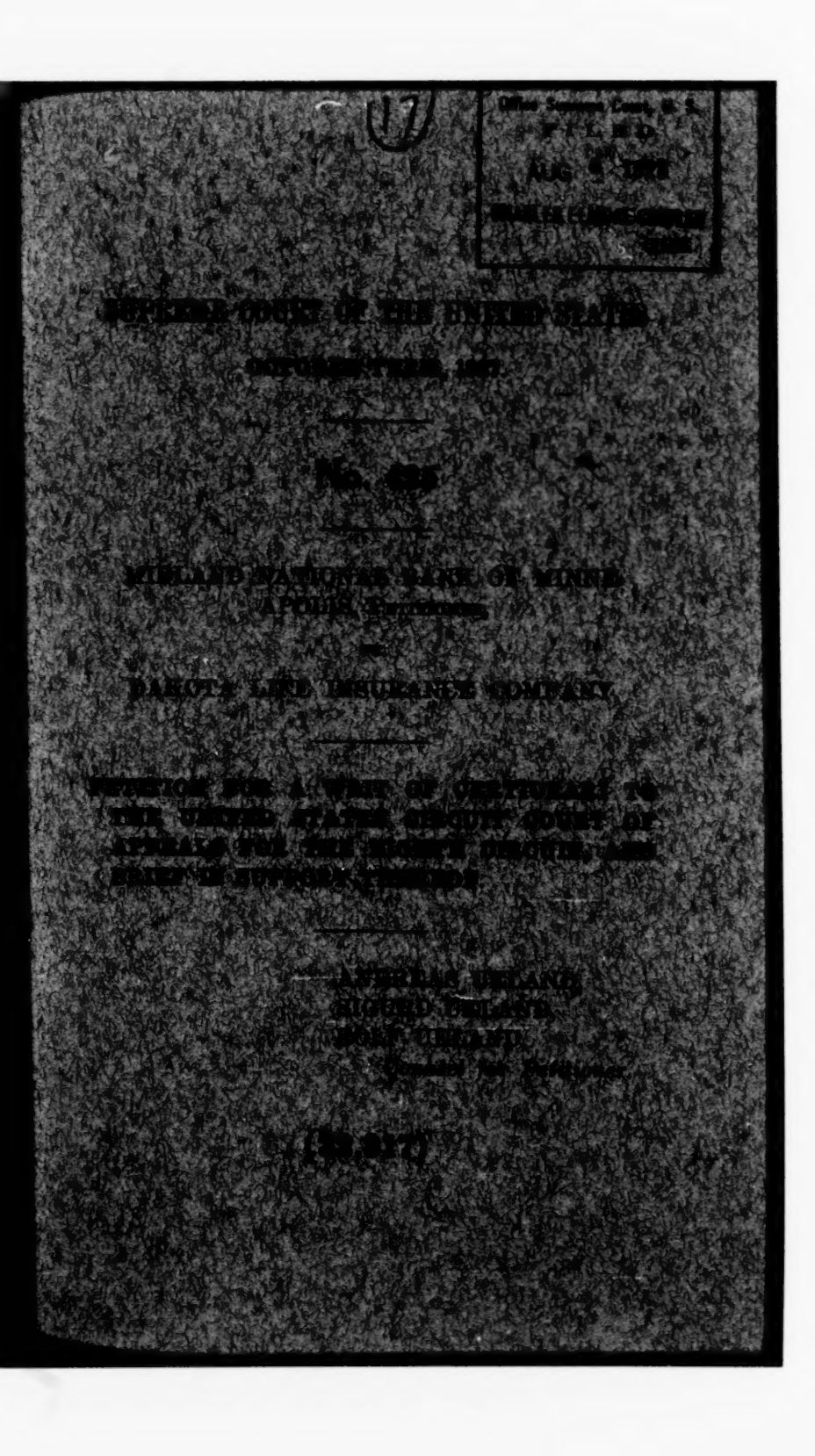

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425

MIDLAND NATIONAL BANK OF MINNEAPOLIS, PETITIONER,

vs.

DAKOTA LIFE INSURANCE COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Midland National Bank of Minneapolis, a national banking association, respectfully submits its petition for a writ of certiorari to review the judgment of the United States Circuit Court of

Appeals for the Eighth Circuit in the above-entitled cause.

The Circuit Court of Appeals has reversed a judgment rendered in the District Court for the District of Minnesota in favor of the petitioner in the sum of $11,066.04.

I.

Nature of Controversy.

This was an action by the petitioner against the respondent to recover on a life insurance policy issued by the respondent on the life of one Oscar Mosher in the sum of $10,000. The policy was a North Dakota contract and was payable to the estate of the insured. Petitioner brought suit as assignee of Mosher and one J. E. Jacobson, who, by a prior assignment, appeared to have acquired some interest in the policy. The respondent originally pleaded fraud in connection with the procurement of the policy (R., 35-39*j*), but on motion the allegations as to fraud in the procurement of the policy were stricken out as irrelevant and redundant matter, because Section 6635*c*, N. D. Comp. Laws 1913, required the policy in question to contain "a provision that the policy shall constitute the entire contract between the parties and shall be incontestable after two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military services in time of war" (R., 40-45). There had been no contest within the two-year period. Thereafter on motion the respondent obtained leave to sub-

stitute an amended pleading, which appears in the record entitled, "Proposed Amended Answer to Amended Complaint" (R., 46-53). In this substituted pleading no question was raised as to the validity of the policy in its inception, but respondent set up lack of consideration and fraud in obtaining the assignment of the policy from Mosher, the insured. The earlier pleading had alleged an assignment of the policy to a creditor of Mosher, the Dazey State Bank (R., 39c), but the substituted pleading did not refer to this assignment. The respondent also set up a judgment of a North Dakota court, rendered upon default canceling the policy as to the administratrix of Mosher. This judgment was rendered in an action begun after the assignment of the policy to the petitioner, and it was conceded that no jurisdiction had been obtained over the petitioner in the action.

At the trial respondent made lengthy offers to prove by three witnesses, Sophia Mosher, Ladbury, and Bell, that there was a lack of consideration and possibly fraud practiced upon Mosher in connection with the execution and delivery to J. E. Jacobson of two $5,000 notes in January, 1923 (R., 102-107). It was these two $5,000 notes, which were endorsed by Jacobson to the petitioner, that the assignment to the petitioner was given to secure. It is important that *these offers had no reference whatever to what transpired with reference to the policy when issued in* 1920.

The offered testimony was excluded on the ground that it was immaterial and irrelevant matter and that proof of fraud practiced upon Mosher in procuring

an assignment of the policy would not constitute a defense available to the insurance company (R., 107-108). Judgment having been rendered for the full amount claimed by petitioner (R., 58), the cause came before the Circuit Court of Appeals on writ of error. For a more detailed statement see the annexed brief.

II.

Theory of the Judgment Below Reversing the Judgment of the District Court.

From the opinion of the Circuit Court of Appeals (R., 193) (18 F. (2d), 903) it appears that the proceedings in the District Court were sustained and reversed in the following particulars:

1. Sustained in holding that the North Dakota judgment or decree was not binding upon the petitioner.

2. Sustained in holding that lack of consideration or fraud practiced upon Mosher in connection with the assignment of the policy to the petitioner would not constitute a defense to respondent.

3. Sustained in holding that fraud in connection with the inception of the policy would not constitute a defense because of the incontestable clause required by the North Dakota statute.

4. Reversed for excluding the offered proof on the theory that such offered proof would have shown the policy to have been in part a wagering contract in its

inception; that to the extent the amount of the policy was in excess of Mosher's indebtedness to the Dazey State Bank when the policy was issued, which indebtedness was assumed by the court to have been $5,686.08 (although there was no allegation or proof as to the extent of such indebtedness), the policy was void and unenforceable in the hands of the petitioner. The court held that the incontestable clause required by the statute would not prevent the assertion of such a defense.

III.

Questions Presented.

I. Did the Circuit Court of Appeals err in reversing the judgment of the trial court on the sole ground that it excluded certain proof (1) where the proof excluded was entirely different from what the appellate court stated it to be; (2) where the excluded proof had nothing whatever to do with the inception of the policy as assumed by the appellate court, but had reference solely to an assignment thereof almost three years later; (3) where the excluded proof had no bearing on the point of wager, upon which the appellate court based its decision; (4) where the question of the wager was not in issue under the pleadings; (5) where the validity of the policy in the first instance was admitted by the pleadings; (6) where the question of wager was not litigated by consent and there was no evidence in the case tending to show that the policy was a wagering contract?

II. Even assuming that the offered proof was as the Circuit Court of Appeals stated it to be:

1. Does a clause required by statute that a policy shall be incontestable after two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military services in time of war, apply to the defense that the policy was a wager in its inception?

2. If so, is such an incontestable clause, which is required by the statute of the State where the policy is made and delivered, against public policy in so far as it applies to the defense that the policy is a wagering contract?

IV.

The Decision of the Circuit Court of Appeals.

The petitioner is advised and believes that the Circuit Court of Appeals in reversing the judgment of the District Court has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision; and has decided an important question of general law in a way probably untenable and in conflict with the weight of authority; all of which will appear more fully in the annexed brief.

ANDREAS UELAND,
SIGURD UELAND,
ROLF UELAND,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
District of Minnesota,
County of Hennepin, ss:

Sigurd Ueland being duly sworn, says that he is one of the counsel for the petitioner named in the foregoing petition and that he knows the contents of such petition and that the facts therein stated are true to the best of his knowledge and belief.

SIGURD UELAND.

Subscribed and sworn to before me this 18th day of July 1927.

[NOTARIAL SEAL.] MAUD GOLDSBURY,
Notary Public, Hennepin County, Minnesota.

My commission expires December 14, 1929.

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